A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Civil Revision No.312 of 2003

Ahmed Mansuri

versus

Shri Nandu Sao and others

ORDER

Post for 30-04-2007

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Civil Revision No.312 of 2003

Applicant Plaintiff

Ahmed Mansuri, S/o Late Rahim Miya @ Makhe Miya, aged about 35 years, R/o Ramanujganj, Ward No.4, Tahsil Pal, Distt. Sarguja (C.G.)

versus

Non-Applicants Defendants

1. Shri Nandu Sao, S/o Ramchandra Sao, aged about 42 years
2. Shri Dilip Sao @ Lallu Sao, S/o Late Ramchandra Sao, aged about 38 years
3. Smt. Shila Devi, Wd/o Ramesh Khare, aged 45 years, R/o Nagar Ramanujganj, Ward No.14, Distt. Sarguja (C.G.)
4. Shri Shankar Bhuiya, S/o Late Basu Bhuiya, aged 40 years, R/o Village Ranka, P.S. Ranka, Distt. Gadhwar (Jharkhand) at present R/o Nagar Ramanujganj, District Sarguja (C.G.)
5. Sate of Chhattisgarh, Through the Collector, District Sarguja (C.G.)

Civil Revision under Section 115 of Code of Civil Procedure

Present : Applicant by Shri Ratan Pusty, counsel.
Non-applicants No.1 to 4 by Shri Manoj Paranjpe,counsel.
Non-applicant No.5/State by Shri Akhil Agrawal, Panel Lawyer.

ORDER

(Passed on 30th APRIL 2007)

This civil revision is directed against an order dated 17.09.2003 passed by the Additional District Judge, Link Court, Ramanujganj, Surguja in Miscellaneous Civil Appeal No.5/2002.

(2) Brief facts are that the applicant/plaintiff had filed Civil Suit No. 17-A/2001 against the non-applicants/defendants before the Civil Judge, Class-I, Ramanujganj, Surguja. The suit was fixed for recording of evidence on 8.3.2002, on which date the applicant/plaintiff and his witnesses remained absent. An application was filed on behalf of the applicant/plaintiff for adjournment under Order 17 Rule 1 of the Code of Civil Procedure (henceforth 'the Code') on the ground that the original counsel Shri R.A.Tiwari had gone to Ambikapur for attending another case. The learned Civil Judge, Class-I, Ramanujganj rejected the application, proceeded under Order 17 Rule 2 of the Code and dismissed the suit. The applicant/plaintiff preferred an application under Order 9 Rule 9 read with Section 151 of the Code for setting aside the dismissal of suit. By an order dated 6.9.2002, the application was dismissed on the ground that it was barred by limitation as also on the ground that there was no justification for setting aside the order dated 8.3.2002. Against this order dated 6.9.2002, the applicant/plaintiff preferred Miscellaneous Civil Appeal No.5/2002 before the IInd Additional District Judge, Ambikapur, Camp Court, Ramanujganj. The Lower Appellate Court dismissed the appeal by the impugned order dated 17.9.2003 on the ground that no satisfactory explanation was given by the applicant/plaintiff for his non-appearance before the Lower Court on 8.3.2002 as also on the ground of limitation. Hence this revision.

(3) Shri Ratan Pusty, learned counsel for the applicant/plaintiff contended that the certified copy of the order dated 8.3.2002 was applied for on 9.3.2002 and copy was received on 15.3.2002. The application under Order 9 Rule 9 of the Code was filed on 15.4.2002 and thus delay of only 2 days had occurred in filing the application,

which ought to have been condoned by the trial court even in the absence of any application under Section 5 of the Limitation Act. It was urged that in the application filed by the applicant/plaintiff under Order 9 Rule 9 of the Code, it was clearly mentioned that the application was within limitation since the counsel for the applicant miscalculated the period of limitation from the date of receipt of the copy of the impugned order dated 8.3.2002 on 15.3.2002 and a revision was filed on 15.4.2002. Thus, under an erroneous assumption that the application under Order 9 Rule 9 of the Code was filed within limitation under Article 122 of the Limitation Act, the counsel for the applicant/plaintiff did not file an application under Section 5 of the Limitation Act for condonation of the delay duly supported with an affidavit. Placing reliance on ***Suresh Kumar and others*** **vs.** ***Kurban Hussain Taiyab Ali (Firm) and others,*** **1996 MPLJ 330,** it was argued that where the Court was of the opinion that in absence of a formal application, the delay could not be condoned, it was the duty of the Court to give an opportunity to the applicant/plaintiff to move an application explaining the cause for delay and to seek condonation under Section 5 of the Limitation Act. Since the Lower Court did not grant any such opportunity, the dismissal of the application under Order 9 Rule 9 of the Code, as barred by limitation, was contrary to law.

(4) It was also urged that on 8.3.2002, the senior counsel appearing for the applicant/plaintiff had gone to Ambikapur and, therefore, a junior counsel had appeared before the Court and preferred an application for adjournment under Order 17 Rule 1 of the Code. Since the counsel engaged by the applicant/plaintiff was not going to be present before the Court on the date of the evidence, the applicant/plaintiff, assuming that an adjournment would be granted, did not remain present. Placing

reliance on ***Mukta Devi Panda*** **vs.** ***Harish Chandra Panda,*** **AIR 1964 Orissa 104,** it was argued that even if the plaintiff had taken all steps for summoning the witnesses for 8.3.2002, it would have been practically impossible for the plaintiff, even if he had remained present in the Court to prosecute the suit in the absence of his senior lawyer, therefore, the lower Court ought to have taken a pragmatic and liberal approach while considering the application under Order 9 Rule 9 of the Code. Placing reliance on ***G.P. Srivastava*** **vs.** ***R.K. Raizada and others,*** **AIR 2000 SC 1221,** it was argued that "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding *ex parte* and could not be stretched to rely upon the other circumstances anterior in time. Therefore, if on earlier days, the applicant/plaintiff had sought adjournments, it would not by itself constitute any ground for rejecting the prayer under Order 17 Rule 1 of the Code by the junior counsel, who appeared on behalf of the applicant/plaintiff on the ground that the original senior counsel had gone to Ambikapur for attending another case. It was contended that both the Courts below have adopted a very narrow and technical approach in dealing with a suit for perpetual injunction, which the plaintiff was prosecuting against the non-applicants/defendants.

(5) On the other hand, Shri Manoj Paranjpe, learned counsel appearing for non-applicants No. 1 to 4/defendants contended that the impugned order dated 17.9.2003 was an interiocutory order since even if the revision was allowed, it would not finally dispose of the suit or other proceedings. Therefore, applying the test laid down by the Apex Court in ***Shiv Shakti Coop. Housing Society, Nagpur*** **vs.** ***Swaraj Developers and others,*** **(2003) 6 SCC 659** and ***Surya Dev Rai*** **vs.** ***Ram Chander Rai and others,*** **(2003) 6 SCC 675,** the impugned order

would be reckoned as an interlocutory order and, therefore, civil revision under Section 115 of the Code was not maintainable. It was also urged that although the Civil Judge, Class-I, Ramanujganj had dismissed the civil suit under Order 17 Rule 2 of the Code, yet since the suit was dismissed for want of evidence, therefore, it ought to be construed as falling under Order 17 Rule 3 of the Code and, therefore, even the application under Order 9 Rule 9 of the Code filed by the applicant/plaintiff in the lower Court was not maintainable.

(6) Having heard the rival contentions, I have perused the record. Order 17 of the Code deals with adjournments. Under Rule 1 of Order 17 of the Code, the Court, upon sufficient cause being shown, has the jurisdiction to grant time to the parties or to any of them, at any stage of the suit, and to adjourn the hearing of the suit for reasons to be recorded in writing. The proviso to Rule 1 of Order 17 of the Code limits the number of such adjournments granted to a party during hearing of the suits to 3. Rule 2 of Order 17 of the Code provides that where, on any date to which the hearing of the suit is adjourned, the parties or any of them failed to appear, the Court may proceed to dispose of the suit in one of the modes in that behalf by Order 9 of the Code or make such other order as it thinks fit. The explanation to Rule 2 of Order 17 of the Code provides that where the evidence or a substantial portion of the evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may, in its discretion, proceed with the case as if such party were present.

(7) Order 17 Rule 3 of the Code reads as under :-

"3. **Court may proceed notwithstanding either party fails to produce evidence, etc.** – Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, –

(a) if the parties are present, proceed to decide the suit forthwith, or

(b) if the parties are, or any of them is, absent, proceed under rule 2."

(8) It is thus clear that Rule 3 of Order 17 of the Code leaves no room for any doubt that where any party to the suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary for the further progress of the suit for which time has been allowed, the Court may notwithstanding, - (a) if the parties are present, proceed to decide the suit forthwith, or (b) if the parties are, or any of them is, absent, proceed under Rule 2 of Order 17 of the Code. Thus, even in a case where a party is absent on an adjourned date of hearing for recording of evidence, sub-clause (b) of Rule 3 of the Code would alone be applicable and the Court would have no option, but to proceed under Rule 2 of Order 17 of the Code. In other words, where the party to the suit, to whom time has been granted, remains absent on the date of hearing, the Court has to proceed under Rule 2 of Order 17 of the Code and not under Rule 3 of Order 17 of the Code. In the present case, the applicant/plaintiff was absent on 8.3.2002, therefore, the learned Civil Judge, Class-I, Ramanujganj rightly proceeded under Order 17 Rule 2 of the Code and, therefore, the order dated 8.3.2002, dismissing the suit, has to be construed to be one passed under Order 9 Rule 8 of the

Code. Therefore, the remedy under Order 9 Rule 9 of the Code was available to the plaintiff and was rightly availed of by him. The arguments advanced by learned counsel for non-applicants No.1 to 4/defendants is, therefore, liable to rejection.

(9) So far as the question of limitation is concerned, in ***Suresh Kumar and others*** **vs.** ***Kurban Hussain Taiyab Ali (Firm) and others*** (supra), it was held as follows :-

> "Section 5 is in the nature of proviso to section 3 of the Limitation Act and would dilute the rigour of section 3. For condonation of delay under section 5, Limitation Act a formal application would not be required if the facts presented before the Court satisfy the judicial conscience of the Court that the applicant before it was prevented for sufficient cause in bringing the proceedings well within limitation. If the Court is of the opinion that in absence of formal application the delay cannot be condoned then it is always the duty of the Court to give an opportunity to the applicant before it to move an application explaining the cause for delay and seek condonation under section 5, Limitation Act. The applicant must get proper opportunity to explain the circumstances which prevented him from drawing proceedings well within limitation. AIR 1981 Orissa 126, AIR 1985 Pat. 148, AIR 1989 Guj. 44, Rel. (Paras 5 and 9)."

(10) Since the delay in filing the application under Order 9 Rule 9 of the Code was of only 2 days beyond the period of limitation of 30 days prescribed under Article 122 of the Limitation Act, the learned Civil Judge Class-I, Ramanujganj, if not satisfied with the explanation offered by counsel, ought to have given an opportunity to move an application

29

explaining the cause of delay and to seek condonation under Section 5 of the Limitation Act. Without giving such an opportunity to the applicant/plaintiff in the facts and circumstances of the case, the Court had no jurisdiction to reject the application under Order 9 Rule 9 of the Code outright on the ground of limitation. Since the delay occurred was of only 2 days, the Civil Judge Class-I, Ramanujganj as also the Lower Appellate Court ought not to have taken a very narrow and technical approach, but should have adopted a pragmatic and liberal approach even in condoning the delay of only 2 days without even asking the applicant to file an application under Section 5 of the Limitation Act.

(11) The only question that now requires consideration is whether the applicant/plaintiff has shown sufficient cause for his non-appearance on 8.3.2002. When the suit was called for hearing, it appears that the applicant/plaintiff, who had knowledge that the senior counsel engaged by him would not be present before the Court, remained absent in the Court. As held in ***Mukta Devi Panda*** **vs.** ***Harish Chandra Panda*** (supra), I am of the considered opinion that sufficient cause was shown by the applicant/plaintiff for his non-appearance for 08-03-2002 because even assuming that the applicant/plaintiff had taken all steps earlier for summoning his witnesses to remain present on 08-03-2002, the applicant/plaintiff could not have prosecuted the suit in the absence of his senior lawyer. It is not disputed that the junior counsel had appeared before the Court and filed an application for adjournment mentioning that senior counsel engaged by the plaintiff had gone to attend another case at Ambikapur. The correct approach for the Court in such a situation would have been to grant a conditional adjournment to the plaintiff stating the he should positively make ~~an~~ arrangement for his representation before the Court on the next date and to take all

steps to keep his witnesses present on the next date of hearing, failing which, no further adjournment shall be granted and the suit shall be proceeded under Order 17 Rule 3 of the Code. In any case, I am of the considered opinion that the Civil Judge Class-I, Ramanujganj as also the Lower Appellate Court ought to have taken a pragmatic and liberal view in considering the application under Order 9 Rule 9 of the Code in the facts and circumstances of the case and ought to have restored the civil suit.

(12) Lastly, it was urged by learned counsel for the non-applicants No.1 to 4/defendants that the revision was barred under the proviso to Section 115 of the Code, since it was preferred against an interlocutory order. Under the proviso to Section 115 of the Code, the test for considering whether an order impugned is an interlocutory order or not, is that if the impugned order had been made in favour of the party applying for revision, it would have finally disposed of the suit or other proceedings. It is obvious that if the miscellaneous civil appeal filed by the applicant/plaintiff under Order 43 Rule 1(c) of the Code had been allowed, Miscellaneous Judicial Case No.3/2002 would have been finally disposed of, since the suit would have been restored to file. In my considered opinion, the miscellaneous judicial case falls under the expression "other proceedings" used in the proviso to Section 115 of the Code. Therefore, applying the test laid down by the Apex Court in ***Surya Dev Rai*** vs. ***Ram Chander Rai and others*** (supra) and ***Shiv Shakti Coop. Housing Society, Nagpur*** vs. ***Swaraj Developers and others*** (supra), I am of the considered opinion that the civil revision is maintainable.

(13) Since the Civil Judge Class-I, Ramanujganj as also the Lower Appellate Court have acted in exercise of their jurisdiction illegally and also with material irregularity, it is a fit case in which the revisional jurisdiction vested in the High Court under Section 115 of the Code should be invoked. As a result, the civil revision is allowed. The impugned order dated 17-09-2003 passed by the Additional District Judge, Link Court, Ramanujganj, Surguja in Miscellaneous Civil Appeal No.5/2002 is set aside. The application filed by the applicant/plaintiff under Order 9 Rule 9 of the Code is allowed. Civil Suit No.17-A/2001 is restored to its file. The Civil Judge Class-I, Ramanujganj shall restore Civil Suit No.17-A/2001 to its original number and after noticing the parties proceed in accordance with law to decide it on merits.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Gopal